Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108

COMMENTS OF ADTRAN, INC

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Summary

ADTRAN supports the Commission's decision to reexamine the Open Internet rules and the Title II re-classification. Prior to the *2015 Open Internet Order*, ADTRAN warned that the proposed burdensome and vague Open Internet rules would stifle broadband investment, and unfortunately those predictions have proven true. ADTRAN thus urges the Commission to replace the current costly and unnecessary Open Internet regulations with legally sustainable rules narrowly tailored to address any legitimate concerns.

The *2015 Open Internet Order*'s re-classification decision erred in a number of respects, although two of those flaws are most significant. First, the 2015 re-classification decision was made in an attempt to bolster the policy determination to replace the vacated Open Internet rules that the earlier Court had thrown out because they imposed common carrier regulations on an information service. But determining which of two definitions of mutually exclusive categories in which to place BIAS is an inherently factual examination, and none of the material facts with regard to the nature of Internet access service had changed. The second major flaw in the *2015 Open Internet Order*'s re-classification was its conflation of the "telecommunications" component of BIAS with the offering as a whole. Indeed, unlike the *2015 Open Internet Order* (and the appellate decision upholding it), both the Majority and the Dissent in the *Brand X* decision understood the difference between the "last mile" telecommunications component and the Internet access service under review in the *2015 Open Internet Order*.

The Commission can and should re-examine the *2015 Open Internet Order*'s re-classification. In doing so, the Commission faces a binary decision as to whether BIAS is an "information service" or a "telecommunications service." BIAS fits "four square" within the definition of "information services," because the service sold to customers is explicitly designed to (and does) provide the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." The ISPs customers retrieve and manipulate information and content stored/cached in the ISPs network, as well as from third parties. That was the case with regard to the "enhanced services" under the pre-1996 Telecommunications Act scheme, as well as when the Commission adjudged Internet access services as "information services" in a series of decisions going back to the 2002 order with regard to Internet access service provided via cable modems. And it remains the same today. Moreover, other Telecommunications Act provisions reinforce classification of BIAS as an "information service." In addition, public interest considerations, including the adverse effect of Title II regulation on broadband investment, support the "re-reclassification" proposed in the *NPRM*.

The Commission does not need to rely upon Title II authority to adopt light-touch regulation of BIAS. The Commission could use Section 706 authority (although it has flaws). Alternatively, the Commission could use a *Computer III*-like model, because there is a "telecommunications" component of Internet access service. ADTRAN remains skeptical about the need for any Open Internet regulations, insofar as anticompetitive conduct is already prohibited by the antitrust laws. In any event, ADTRAN urges the Commission to eliminate the

"General Conduct" rule and the prohibition on paid prioritization, because those rules stifle beneficial services. The Commission should also eliminate the special enforcement mechanisms adopted in the *2015 Open Internet Order*.

On the other hand, assuming the Commission includes modified reasonable network management exceptions to the blocking and throttling "bright line" rules, they are less objectionable than the ban on paid prioritization or the General Conduct rule. Any such rules should apply to both mobile and fixed BIAS, recognizing that differing architectures could affect what constitutes reasonable network management. ADTRAN also supports a transparency rule based on the 2010 version, with the addition of the "safe harbor." In addition, ADTRAN supports continued Lifeline subsidies for broadband, which is permissible under the Communications Act.

ADTRAN has provided herein its suggestions for imposing any necessary light-touch regulation, consistent with the Congressional directive "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." ADTRAN believes that such a course of action will best serve the public interest.

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ADTRAN, Inc. ("ADTRAN") takes this opportunity to comment on several issues raised in the recent Notice of Proposed Rulemaking[1] seeking to reexamine the Commission's 2015 decision, which adopted Open Internet rules and reclassified Internet access service as a Title II "telecommunications service" in response to the request of the White House.[2] ADTRAN has been an active participant in the Commission's earlier Open Internet rulemaking,[3] as well as other related broadband proceedings.[4] As a manufacturer of telecommunications equipment used

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[1] *Restoring Internet Freedom,* WC Docket No. 17-108, FCC 17-60, released May 23, 2017 (hereafter cited as "*NPRM*").

[2] *In the Matter of Protecting and Promoting the Open Internet*, WC Docket No. 14-28, 30 FCC Rcd 5601 (2015) (hereafter cited as the "*2015 Open Internet Order*").

[3] *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010) (hereafter cited as the "*2010 Open Internet Order"*).

[4] *See e.g.*, ADTRAN Comments in WC Docket No. 17-84, filed June 15, 2017; ADTRAN Comments in WC Docket No. 10-90, filed February 13, 2017; ADTRAN Reply Comments in GN Docket No. 16-245, filed September 21, 2016; ADTRAN Comments in GN Docket No. 16-245, filed September 6, 2016; ADTRAN Comments on the Public Notice in GN Docket No. 14-28, filed March 21, 2014; ADTRAN Comments in GN Docket No. 09-191 and WC Docket No. 07-52, filed January 10, 2010; ADTRAN Comments in GN Docket No. 09-191and WC Docket No. 07-52, filed October 12, 2010; ADTRAN Comments in GN Docket 09-137, filed September 4, 2009, ADTRAN Comments in Docket 09-51, filed August 31, 2009; Reply Comments of ADTRAN in Docket 09-51, filed July 21, 2009; Ex Parte Notice of ADTRAN in Docket 09-51, filed June 23, 2009; Ex Parte Notice of ADTRAN in Docket 09-51, filed May 22, 2009; Ex Parte Notice of ADTRAN in Docket 09-40, filed April 13, 2009; Ex Parte Notice of ADTRAN in Docket 09-40, filed April 6, 2009; Ex Parte Notice of ADTRAN in Docket 09-29, filed March 13, 2009.

in the Internet and Internet access networks, ADTRAN supports a dynamic, robust, open and widely available Internet, and ADTRAN supported the Commission's earlier adoption of greater consumer disclosure obligations.[5] As explained herein, ADTRAN welcomes the Commission's decision to reexamine the Open Internet rules and the Title II re-classification. Prior to the *2015 Open Internet Order*, ADTRAN warned that the proposed burdensome and vague Open Internet rules would stifle broadband investment,[6] and unfortunately those predictions have proven true. ADTRAN thus urges the Commission to replace the current burdensome and unnecessary Open Internet regulations with legally sustainable rules narrowly tailored to address any legitimate concerns. While everyone benefits from an "open Internet," the public interest is disserved by the poorly crafted Open Internet rules adopted in the *2015 Open Internet Order*.

ADTRAN, founded in 1986 and headquartered in Huntsville, Alabama, is a leading global provider of networking and communications equipment. ADTRAN's products enable voice, data, video and Internet communications across a variety of network infrastructures. ADTRAN's solutions are currently in use by service providers, private enterprises, government organizations and millions of individual users worldwide. ADTRAN thus brings an expansive perspective to this proceeding, as well as an understanding of the importance to individuals, communities and our country of robust and ubiquitous broadband. ADTRAN has been a strong advocate in Commission proceedings to help spur broadband deployment, and has itself launched a gigabit initiative that has far surpassed its goal of facilitating the deployment of 200 gigabit communities by the end of 2015, with over 350 gigabit communities deployed as last

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[5] *See*, ADTRAN Comments in GN Docket No. 09-191and WC Docket No. 07-52, filed January 10, 2010 at pp. 14-15.

[6] *See*, ADTRAN Comments in GN Docket No. 14-28, filed July 15, 2014, at pp. 12-15.

year.[7] As the Commission recognizes, the Open Internet rules and the Title II re-classification have stifled innovation and deterred investment, to the detriment of the public interest.

I. The Proper Classification of Broadband Internet Access Services

A. The 2015 Re-classification Suffered from Major Flaws

The *NPRM* initially seeks comment on the proper classification of broadband Internet access service (BIAS) as either a "telecommunications service" or an "information service." As the *NPRM* observes, the previous decision to re-classify BIAS as a "telecommunications service" subject to common carrier regulation under Title II of the Telecommunications Act of 1934 reversed a long line of Commission decisions that had concluded otherwise.[8] The *2015 Open Internet Order*'s re-classification decision erred in a number of major respects, although two of those flaws are most significant. First, the 2015 re-classification decision was made in an attempt to bolster the policy determination to replace the vacated Open Internet rules that the earlier Court had thrown out because they imposed common carrier regulations on an information service.[9] But determining which of two definitions of mutually exclusive categories in which to place BIAS is an inherently factual examination – not a charade of deciding which

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[7] *See, Press Release*, "ADTRAN Sets the Nation's Communities on the Path to Gigabit Transformation -- Utilities, MSOs and land developers deliver Gigabit broadband to over 350 communities," http://phx.corporate-ir.net/phoenix.zhtml?c=67989&p=irol-newsArticle&ID=2178711; http://gigcommunities.net/adtran-reaches-200-gigabit-community-milestone/ ("More than 200 communities are now able to access next-generation gigabit broadband services as a result of ADTRAN's Enabling Communities, Connecting Lives program, ADTRAN announced August 11."); *Light Reading*, August 13, 2014, "Adtran Launches 'Gig Communities' Initiative," available at http://www.lightreading.com/broadband/fttx/adtran-launches-gig-communities-initiative/d/d-id/710330. *See also*, http://gigcommunities.net/.

[8] *NPRM* at ¶¶ 10-17.

[9] *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

outcome you want and then cramming the service into that category regardless of the facts. Indeed, as the Court of Appeals held with regard to an earlier Commission decision to classify a service under Title II to further policy goals:

> Further, we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending on the regulatory goals it seeks to achieve.[10]

The *2015 Open Internet Order* made a half-hearted effort to claim that the nature of the services offered by ISPs had changed since the Commission's multiple previous determinations that the service was an "information service,"[11] but the Commission acknowledged in the *2015 Open Internet Order* that it would have re-classified BIAS as a Title II service even if nothing had changed:

> In response to arguments raised in the dissenting statements, we clarify that, even assuming, *arguendo*, that the facts regarding how BIAS is offered had not changed, in now applying the Act's definitions to these facts, we find that the provision of BIAS is best understood as a telecommunications service, as discussed below, … and disavow our prior interpretations to the extent they held otherwise.[12]

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[10] *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994). This pre-1996 decision is still relevant, because the 1996 Telecommunications Act's use of the term "telecommunications service" was intended to be the equivalent of the pre-1996 Telecommunications Act term of "common carrier." *See Virgin Islands Telephone Company v FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999):

> As support for its conclusion, the Commission looked to its decision in *Cable & Wireless*, where it had concluded that the definition of "telecommunication services" in the 1996 Act was "intended to clarify that telecommunications services are common carrier services," *Cable & Wireless* ¶ 13, citing the above-mentioned legislative history that "the definition of telecommunications service `recognizes the distinction between common carrier offerings that are provided to the public ... and private services.'" *Id.* (quoting H.R. Conf. Rep. No. 104-458, at 115).

[11] *NPRM* at ¶¶ 36-37.

[12] *2015 Open Internet Order* at n.993. In upholding the *2015 Open Internet Order*, the Court accepted the Commission's argument: "But we need not decide whether there 'is really

But the *2015 Open Internet Order*'s re-classification decision -- based on a policy desire to support new open Internet rules rather than the nature of the service -- runs afoul of the Court's holding in *Southwestern Bell* cited above that the Commission cannot classify services simply to achieve desired regulatory goals.

The second major flaw in the Commission's decision to re-classify BIAS as a "telecommunications service" was its conflation of the Internet access service provided to customers with the "telecommunications" component of that service. The statutory definition of information services – "The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information ***via telecommunications***, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service"[13] -- makes clear that there is necessarily a telecommunications element to an information service. Thus, it is no surprise that the *2015 Open Internet Order* concluded that BIAS "involves telecommunications."[14] Such a finding is unremarkable, considering that the definition of "information services" quoted above specifies that such services are provided "via telecommunications." But BIAS fits "four square" within the definition of "information services," because the service sold to customers is explicitly designed to (and does) provide the

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anything new' because, as the partial dissent acknowledges, *id.*, the Commission concluded that changed factual circumstances were not critical to its classification Decision." *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 709 (D.C. Cir 2016).

[13] 47 U.S.C. §153(24) (emphasis added).

[14] *2015 Open Internet Order* at ¶ 361-362.

"capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." The ISPs customers retrieve and manipulate information and content stored/cached in the ISPs network, as well as from third parties. That was the case with regard to the "enhanced services" under the pre-1996 Telecommunications Act scheme,[15] as well as when the Commission adjudged Internet access services as "information services" in a series of decisions going back to the 2002 decision with regard to Internet access service provided via cable modems.[16]

The Commission's tortured effort in the *2015 Open Internet Order*[17] to segregate the various capabilities that make up BIAS from the telecommunications component of BIAS ignores the full bundle of capabilities and services that ISPs provide -- and that customers purchase. There is a separate issue that had been raised in the Supreme Court's *Brand X* decision as to whether the telecommunications component of BIAS should be considered an independent

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[15] *E.g.*, *Bell Atlantic Tel. Cos.*, 3 FCC Rcd 6045 (Com. Car. Bur. 1988) (a "gateway service" that would "allow a customer with a personal computer . . . to reach an array" of "databases providing business … investment, . . . and entertainment information" was an unregulated enhanced service).

[16] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998) (*Stevens Report*); *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al*., CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007).

[17] *2015 Open Internet Order* at ¶¶ 363-81.

"offering," because the Court viewed "offer" as somewhat ambiguous. As a technical matter, it should be possible in most situations to unbundle and separately market a "telecommunications" channel over which a consumer could connect to the Internet access services of a third party provider. Indeed, originally the connection to services such as AOL were obtained via dial up modems, and many telephone companies offered (and some still offer) a DSL broadband connection to access a third-party ISPs. But such "last mile" services/components do not constitute the Internet access service that is at issue here.[18]

Commissioner Clyburn, in her dissenting statement to the *NPRM*, alludes to Justice Scalia's dissent in *Brand X* to claim that the majority engaged in "interpretive jiggery-pokery." But the functionality that Justice Scalia was addressing in *Brand X* was solely the last-mile connection -- not the complete package of Internet access service and capabilities that was re-classified in the *2015 Open Internet Order*:

> Despite the Court's mighty labors to prove otherwise, *ante*, at 989-1000, ***the telecommunications component of cable-modem service*** retains such ample independent identity that it must be regarded as being on offer—especially when seen from the perspective of the consumer or the end user, which the Court purports to find determinative, *ante*, at 990, 993, 998, 1000. The Commission's ruling began by noting that cable-modem service provides *both* "high-speed access to the Internet" *and* other "applications and functions," *Declaratory Ruling* 4799, ¶ 1, because that is exactly how any reasonable consumer would perceive it: as consisting of two separate things.[19]

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[18] *Cf*., *NPRM* at fn. 73:

> In the past, rate-of-return carriers have offered broadband Internet access transmission service as a common-carriage last-mile service that transmits data between and end user and an ISP. *Wireline Broadband Classification Order*, 20 FCC Rcd at 14899–900, paras. 86–88. Absent an ISP at the other end, however, broadband Internet access transmission service only transmits data to a carrier's central office (or other aggregation point) as it does not itself offer the capabilities that come with Internet access.

[19] *National Cable & Telecommunications Ass'n v. Brand X Internet Service*, 545 U.S. 967, 1008 (2005) (Scalia Dissent) (emphasis added)(hereafter cited as "*Brand X*").

The Majority Opinion in *Brand X* likewise makes abundantly clear that the Supreme Court understood the difference between the telecommunications component of Internet access service, and the "package" as a whole.[20] Commissioner Clyburn's reliance on Justice Scalia's dissent in

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[20] *Brand X*, 545 U.S at 987-88:

> The Commission first concluded that cable modem service is an "information service," a conclusion unchallenged here. The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ." § 153(20). Cable modem service is an information service, the Commission reasoned, because it provides consumers with a comprehensive capability for manipulating information using the Internet via high-speed telecommunications. That service enables users, for example, to browse the World Wide Web, to transfer files from file archives available on the Internet via the "File Transfer Protocol," and to access e-mail and Usenet newsgroups. *Declaratory Ruling* 4821, ¶ 37; *Universal Service Report* 11537, ¶ 76. Like other forms of Internet service, cable modem service also gives users access to the Domain Name System (DNS). DNS, among other things, matches the Web page addresses that end users type into their browsers (or "click" on) with the Internet Protocol (IP) addresses of the servers containing the Web pages the users wish to access. *Declaratory Ruling* 4821-4822, ¶ 37. All of these features, the Commission concluded, were part of the information service that cable companies provide consumers. *Id.*, at 4821-4823, ¶¶ 36-38; see also *Universal Service Report* 11536-11539, ¶¶ 75-79.
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> At the same time, the Commission concluded that cable modem service was not "telecommunications service." "Telecommunications service" is "the offering of telecommunications for a fee directly to the public." 47 U. S. C. § 153(46). "Telecommunications," in turn, is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." § 153(43). The Commission conceded that, like all information-service providers, cable companies use "telecommunications" to provide consumers with Internet service; cable companies provide such service via the high-speed wire that transmits signals to and from an end user's computer. *Declaratory Ruling* 4823, ¶ 40. For the Commission, however, the question whether cable broadband Internet providers "offer" telecommunications involved more than whether telecommunications was one necessary component of cable modem service. Instead, whether that service also includes a telecommunications "offering" "turn[ed] on the nature of the functions the *end user* is offered," *id.*, at 4822, ¶ 38 (emphasis added), for the statutory definition of "telecommunications service" does not "res[t] on the particular types of facilities used," *id.*, at 4821, ¶ 35; see § 153(46) (definition of "telecommunications service" applies "regardless of the facilities used").

Brand X -- and her seeming failure to appreciate the distinction between the telecommunications component of Internet access service vs. the Internet access service as a whole – should result in classification of her argument in her dissenting statement as "argle bargle."[21]

B. An Objective Review of BIAS Leads to the Conclusion that it is Properly Classified as an Information Service

In classifying broadband Internet access service, the Commission is faced with a binary decision as to whether it falls within the category of an "information service" or a "telecommunications service." Unlike physics, which incorporates a wave-particle duality for light,[22] the Commission and Courts have recognized that the two statutory categories of "telecommunications services" and "information services" are mutually exclusive.[23] The *NPRM*

> Seen from the consumer's point of view, the Commission concluded, cable modem service is not a telecommunications offering because the consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access: "As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities." *Declaratory Ruling* 4823, ¶ 39. The wire is used, in other words, to access the World Wide Web, newsgroups, and so forth, rather than "transparently" to transmit and receive ordinary-language messages without computer processing or storage of the message. See *supra*, at 976 (noting the *Computer II* notion of "transparent" transmission). The integrated character of this offering led the Commission to conclude that cable modem service is not a "stand-alone," transparent offering of telecommunications. *Declaratory Ruling* 4823-4825, ¶¶ 41-43.

[21] *United States v. Windsor*, 133 S.Ct. 2675, 2709 (2013) (Justice Scalia dissenting). In upholding the *2015 Open Internet Order*, the Court of Appeals Majority Opinion likewise failed to appreciate this distinction, and indeed appeared to think that "last mile" was simply a reference to distance. *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 702 (D.C. Cir 2016) ("We have no need to resolve this dispute because, even if the *Brand X* decision was only about the last mile, the Court focused on the nature of the functions broadband providers offered to end users, ***not the length of the transmission pathway***, in holding that the "offering" was ambiguous.") (emphasis added).

[22] *See, e.g.*, http://science.howstuffworks.com/light6.htm.

[23] *E.g., NPRM* at ¶ 40; *Verizon v. Federal Communications Commission*, 740 F.3d 623, 650 (D.C. Cir. 2014).

tentatively concludes that BIAS "appears to offer its users the 'capability' to perform each and every one of the functions listed in the definition—and accordingly appears to be an information service by definition," and requests comment on that assessment.[24]

In conducting its analysis of the proper regulatory classification of BIAS, the *NPRM* seeks comment on whether the Commission has proper grounds for re-assessing the *2015 Open Internet Order'*s Title II re-classification.[25] ADTRAN believes that the Commission clearly has the authority and an obligation to re-assess the Title II re-classification. As an initial matter, the Commission can reverse a previous decision, so long as it acknowledges it is changing the prior decision and provides a reasoned explanation for the reversal.[26] In this case, a reversal would certainly be justified on the basis of the errors underlying the *2015 Open Internet Order*'s re-classification of BIAS as a Title II service discussed in the previous section.

The *NPRM* also addresses the precedent of a series of Commission decisions prior to the *2015 Open Internet Order* that also found BIAS to be an information service.[27] This precedent is relevant not simply as *stare decisis*, but because the Commission in those previous decisions had analyzed the facts, nature of the services, and the legislative interplay and history to conclude that BIAS is an information service. And none of the material facts or circumstances of ISPs' offerings had changed in any significant manner between when those earlier cases were decided and the *2015 Open Internet Order*.[28] The only thing that changed from the previous

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[24] *NPRM* at ¶ 27.

[25] *NPRM* at ¶¶ 53-54.

[26] *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515-16 (2009).

[27] *NPRM* at ¶¶ 38-43.

[28] *Cf., NPRM* at n. 92 ("We note that in conducting its review of the changed circumstances,

classification decisions was a desire to impose common carrier-like regulations on Internet service providers, and a directive from the White House to re-classify BIAS as a Title II service.[29]

Likewise, the statutory definitions and the other statutory provisions of the Telecommunications Act support classification of BIAS as an information service. As explained previously, BIAS fits perfectly within the statutory definition of "information services."[30] Moreover, Section 230 of the Communications Act -- which provides protection for "Good Samaritan" blocking and screening of offensive material -- specifies that an interactive computer service means "***any information service***, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system ***that provides access to the Internet*** and such systems operated or services offered by libraries or educational institutions."[31] Likewise, Section 231 of the Communications Act --

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the D.C. Circuit concluded that there was no need to decide whether there really was anything new because the Commission in the *Title II Order* 'concluded that changed factual circumstances were not critical to its classification decision.' *USTelecom*, 825 F.3d at 709.").

[29] *See, e.g.*, "Regulating The Internet: How The White House Bowled Over FCC Independence," A Majority Staff Report of the Committee on Homeland Security and Governmental Affairs, United States Senate (February 29, 2016) (available at https://www.hsgac.senate.gov/media/majority-media/chairman-johnson-releases-report-on-how-the-white-house-bowled-over-fcc-independence).

[30] *See* pp. 5-9, *supra*.

[31] 47 U.S.C. § 230(f)(2) (emphasis added). Moreover, Section 230(b)(2) declares that it is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." Heavy-handed Title II regulation is inconsistent with this policy.

which addresses restricting access to harmful materials to minors distributed via the Internet – includes a definition of Internet Access Service that specifies:

> The term "Internet access service" means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. ***Such term does not include telecommunications services***.[32]

Thus, these other Communications Act provisions reinforce that BIAS is an information service, not a telecommunications service.

The Commission also seeks comment on the implications of classification for "public policy and our goal of benefiting consumers through greater innovation, investment, and competition."[33] As explained above, the classification of Internet access service should be driven by the nature of the service and how it is offered to customers – which clearly is an "information service." But as a separate matter, light-touch regulation of BIAS well serves the public interest. And while to some extent the degree of regulation can be set by the Commission regardless of the classification, the *2015 Open Internet Order* demonstrates that its re-classification of BIAS as a Title II service did have some adverse "side effects" that are counter to the policy goals of greater innovation, investment and innovation for the Internet ecosphere.

One consequence of the re-classification of BIAS was to strip the Federal Trade Commission of jurisdiction over the privacy practices of Internet service providers under the "common carrier exemption" of the FTC Act.[34] And as a result of the Commission's adoption of

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[32] 47 U.S.C. § 231(e)(4) (emphasis added).

[33] *NPRM* at ¶ 25.

[34] 15 U.S.C. § 45(a)(2). Section provides:

> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, ***except*** banks, savings and loan institutions described in section 57a(f)(3) of

new privacy rules some 20 months after the *2015 Open Internet Order*, there were inconsistent privacy rules applicable to different components (and competitors) in the Internet ecosphere. Congress subsequently disapproved the Commission's privacy rules under the Congressional Review Act (CRA),[35] leaving a vacuum (once again) as a result of the Ninth Circuit decision holding that the FTC's Act's common carrier exemption is status based, not activities based.[36] The uncertainty is amplified by the CRA restriction on the ability of the FCC to adopt new privacy rules "substantially the same as" the disapproved rules[37] -- a vague term without precedential interpretations – thus creating a cloud over whatever new privacy rules, if any, the Commission decides to adopt. And such uncertainty is harmful to consumers, while also dampening investment by Internet service providers and edge providers.

Moreover, the re-classification of BIAS as a "telecommunications service" carried with it a slew of common carrier statutory and regulatory obligations imposed under Title II of the Communications Act. In the *2015 Open Internet Order*, the Commission acknowledged the

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> this title, Federal credit unions described in section 57a(f)(4) of this title***, common carriers subject to the Acts to regulate commerce***, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C.A. § 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C.A. § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce. (emphasis added)

[35] 5 U.S.C. §801.

[36] *FTC v. AT&T Mobility LLC*, 835 F.3d 993 (9th Cir. 2016), *reh'g en banc granted*, No. 15-16585, 2017 WL 1856836 (9th Cir. May 9, 2017).

[37] 5 U.S.C. §801(b)(2) ("A rule that [was disapproved under the CRA] may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule").

significant burdens that compliance with monopoly-era telephone regulations would entail.[38] The *2015 Open Internet Order* attempted to correct that problem via wholesale forbearance of the "unnecessary" regulations pursuant to the Commission's authority under Section 10 of the Communications Act.[39] However, the purported "light-touch" regulations imposed and/or left in place under the *2015 Open Internet Order* were anything but light-touch.

While the *2015 Open Internet Order* claimed to have eliminated any rate regulation through its forbearance actions,[40] the Commission did not forbear from Sections 201, 202 and 208 of the Communications Act,[41] and the Commission explicitly disavowed its precedent in which it allowed market forces rather than regulation to dictate the reasonableness of a carrier's rates and practices under Sections 201 and 202.[42] So while the Commission forbore from *ex ante*

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[38] *See, e.g.*, *2015 Open Internet Order* at ¶¶ 37-38:

> Today, our forbearance approach results in over 700 codified rules being inapplicable, a "light-touch" approach for the use of Title II. This includes no unbundling of last-mile facilities, no tariffing, no rate regulation, and no cost accounting rules, which results in a carefully tailored application of only those Title II provisions found to directly further the public interest in an open Internet and more, better, and open broadband. … This is Title II tailored for the 21st Century. Unlike the application of Title II to incumbent wireline companies in the 20th Century, a swath of utility-style provisions (including tariffing) will *not* be applied.

[39] 47 U.S.C. § 160.

[40] *2015 Open Internet Order* at ¶ 37 ("This includes no unbundling of last-mile facilities, no tariffing, no rate regulation, and no cost accounting rules).

[41] *2015 Open Internet Order* at ¶ 431 ("As proposed in the *2014 Open Internet NPRM*, we do not forbear from sections 201, 202, and 208, along with key enforcement authority under the Act, both as a basis of authority for adopting open Internet rules as well as for the additional protections those provisions directly provide.").

[42] *2015 Open Internet Order* at n. 1012 (disavowing *Orloff v. Vodafone AirTouch Licenses LLC d/b/a Verizon Wireless,* 17 F.C.C.R. 8987 (2002), *aff'd Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003)).

tariff rate regulation, significant uncertainty remains as to whether *ex post* rate regulation could or would be applied. In addition, the *2015 Open Internet Order*'s wholesale *sua sponte* forbearance was granted pursuant to a vague, open-ended standard,[43] and so could be summarily reversed by subsequent Commission decisions, thus magnifying the uncertainty spawned by the re-classification.

The *2015 Open Internet Order*'s re-classification decision additionally created significant uncertainty through the manner in which it decided it could impose Title II regulation on interconnection services as derivative of the classification of BIAS as a Title II service.[44] This novel theory would allow the Commission to ignore the traditional test for common carriage under which a service provider that individually negotiates with customers is not offering common carrier services.[45] This hallmark of common carriage – offering service to the public

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[43] *2015 Open Internet Order* at ¶ 435:

> Because the Commission is not responding to a petition under section 10(c), we conduct our forbearance analysis under the general reasoned decision making requirements of the Administrative Procedure Act, without the burden of proof requirements that section 10(c) petitioners face.

[44] *2015 Open Internet Order* at ¶¶ 337-338.

[45] *E.g., National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 525 F.2d 630, 641 (D.C. Cir. 1976)(citations omitted):

> What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier "undertakes to carry for all people indifferently ...." This does not mean a given carrier's services must practically be available to the entire public. One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population. And business may be turned away either because it is not of the type normally accepted or because the carrier's capacity has been exhausted. But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.

indiscriminately – is reflected in the Communications Act definition of "telecommunications service."[46] The expansion of common carrier regulatory authority in the *2015 Open Internet Order* can lead to absurd results. For example, under the *2015 Open Internet Order*'s theory of derivative regulatory authority, the Commission could presumably regulate private satellite systems or private undersea cable systems as common carriers if they were used to transmit Internet traffic. ADTRAN thus agrees with the *NPRM*'s proposal to reject the *2015 Open Internet Order*'s claim of derivative regulatory authority over interconnection services.[47]

Moreover, the particular rules that the Commission adopted in the *2015 Open Internet Order* were a far cry from "light-touch" regulation. The open-ended General Conduct Rule gave the Commission unbounded authority to decide that a particular business offering was unlawful. Indeed, the year-long Bureau investigation of "sponsored data" and "zero rating" services with

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[46] 47 U.S.C. § 153(53). *See also, Virgin Islands Telephone Company v FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999):

> The Commission construed the term "telecommunications carrier" by reasoning that it "means essentially the same as common carrier" and that it does not "introduce a new concept whereby we must look to the customers' customers to determine the status of a carrier." *Commission Order* ¶ 6. As support for its conclusion, the Commission looked to its decision in *Cable & Wireless,* where it had concluded that the definition of "telecommunications services" in the 1996 Act was "intended to clarify that telecommunications services are common carrier services," *Cable & Wireless* ¶ 13, citing the above-mentioned legislative history that "the definition of telecommunications service `recognizes the distinction between common carrier offerings that are provided to the public ... and private services.'" *Id.* (quoting H.R. Conf. Rep. No. 104-458, at 115). Reasoning from this statement in the legislative history, the Commission viewed the definition of "telecommunication services," that is, "the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public," to be essentially a way of restating the definition of common carrier as clarified by *NARUC I.*

[47] *NPRM* at ¶ 42.

inconclusive results exemplifies the inherently vague nature of that rule.[48] The uncertainty caused by those vague and burdensome regulations, exacerbated by the uncertainty created by the re-classification of BIAS as a Title II service discussed above, has had a dampening effect on broadband investment.[49]

In sum, the Commission should reverse the *2015 Open Internet Order*'s classification of BIAS as a "telecommunications service." The re-classification by the previous Commission of BIAS as a "telecommunications service" is inconsistent with the law, inconsistent with the facts and contrary to the public interest. ADTRAN thus urges the Commission to once again classify BIAS as an "information service."

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[48] *Wireless Telecommunication Bureau, Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero Rated Content and Services*, (WTB Jan. 11, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342987A1.pdf (*Zero Rating Report*). That report was subsequently rescinded. *Wireless Telecommunications Bureau Report: Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero Rated Content and Services*, DA 17-127, released February 3, 2017.

[49] *NPRM* at ¶ 45. ADTRAN itself may have suffered the consequences of the adverse effects on investment of the *2016 Open Internet Order*. Shortly after the adoption of the Title II reclassification, one of ADTRAN's customers canceled what could have been a several hundred million dollar order for broadband equipment. See, Transcript from ADTRAN's First Quarter 2015 Earnings Call, April 22, 2015, available at http://s22.q4cdn.com/718573125/files/doc_financials/quarterly_results/2015/ADTN-USQ_Transcript_Q12015.pdf ("Although we had completely satisfied the lab requirements, and were scheduled to enter the first field application and had received initial purchase orders, our program was halted as budget issues forced a re-evaluation and a redefinition of that program."). Although we do not know all of the reasons for the cancellation, ADTRAN's anecdotal experience is consistent with the industry-wide trends noted by the Commission in the *NPRM*.

II. What Open Internet Regulations the Commission Should Adopt

A. Statutory Authority for Light-Touch Regulation

Assuming the Commission properly classifies BIAS as an "information service," it still retains authority to apply whatever light-touch regulation the Commission determines to be necessary.[50] As an initial matter, ADTRAN observes that the Court of Appeals had previously upheld the Commission's reliance on Section 706 as providing legal authority for the adoption of Open Internet rules in 2010.[51] ADTRAN believes that such an expansive reading of Section 706 was wrong.[52] Nevertheless, under that precedent the Commission can adopt Open Internet

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[50] *NPRM* at ¶¶ 100-103.

[51] *Verizon v. Federal Communications Commission*, 740 F.3d 623, 636-42 (D.C. Cir. 2014). The *Verizon* Court found, however, that the no blocking and no throttling rules adopted in 2010 were unlawful, because they were common carrier regulations, and the Commission at that time classified BIAS as an "information service."

[52] *See e.g.*, Comments of Earl Comstock in GN Docket 14-28, filed September 15, 2014 at pp. 18-29. The Commission's (and the Court's) finding of authority under Section 706 was based on a misreading of the legislative history. *See*, Comments of Full Service Network LP in Docket No. GN 14-28, filed on March 21, 2014 at pp. 6-7:

> Likewise, the *Verizon* court erred in relying on the legislative history of section 706 without examining the bill text to which the Senate committee report referred. *Verizon* at 639. The report language in question described the bill as reported from committee. As reported by the Senate Commerce Committee the final sentence of the proposed text of what is now section 706(b) read "If the Commission's determination is negative, it shall take immediate action *under this section, and it may preempt State commissions that fail to act to ensure such availability.*" *See* section 304(b) of S. 652 as reported (1995), available at http://beta.congress.gov/104/bills/s652/BILLS-104s652rs.pdf at 121 (emphasis added). The reported language of the bill clearly granted authority to the Commission, both to act under section 706 and to preempt State commissions. That unambiguous grant of authority was the "fail-safe" to which the Senate committee report referred. In conference the language was modified to strip out the italicized text and insert the present ending. Had the court reviewed the final conference report that accompanied the Telecommunications Act of 1996, they should have noted that the conference report made no mention of a "fail-safe" provision, that the House had no similar provision in its amendment, and that the conferees adopted the Senate provision "with a modification." *See* H. Rep. 104-458 (1996) at 210, *reprinted* in U.S.C.C.A.N. 4

regulations, so long as any such regulations do not amount to common carrier regulation.

The Commission, however, has a better alternative basis for adopting light-touch open Internet regulations so that it need not rely on Section 706, with its limits and flaws.[53] As discussed above, it is abundantly clear that there is a "telecommunications" component to BIAS. That was the issue being addressed in the *Brand X* decision, and the statutory definition of "information services" specifies that it is provided "via telecommunications." Moreover, the Commission, under appropriate circumstances, has the authority to compel that the telecommunications component be offered on a common carrier basis.

The courts have traditionally applied a two part test for determining whether a service is a common carrier service:

> The key factor is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use. In making this determination, we must inquire, ***first, whether there will be any legal compulsion thus to serve indifferently***, and if not, second, whether there are reasons implicit in the nature of [the service provider's] operations to expect an indifferent holding out to the eligible user public.[54]

(1996) at 224. That modification removed the "fail-safe" grant of authority. As a result, in conference Congress changed section 706 from an affirmative grant of separate authority to a hortatory statement because Congress was adopting detailed amendments to the Communications Act to provide explicit and detailed regulatory authority that the Commission could use to address any failure to deploy advanced telecommunications capability in a reasonable and timely fashion to all Americans. *See, e.g.*, sections 10, 251, 252, 253 and 254 of the Communications Act (47 U.S.C. 160, 251, 252, 253, and 254).

[53] For example, authority under Section 706 (b) is dependent on a negative determination as to whether "advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." It is not clear what would happen to regulations adopted pursuant to such authority when the Commission subsequently finds that such capabilities are being deployed in a reasonable and timely fashion. Alternatively, the Commission could ignore its obligation to undertake a thorough and objective analysis in conducting the annual Section 706 assessment, and instead cherry pick from the record and "move the goal posts" in order to make a negative determination, regardless of the progress being made. Recent Section 706 Reports suggest the Commission had been taking this latter approach.

[54] *Nat. Ass'n of Regulatory Utility Com'rs v. FCC*, 525 F. 2d 630, 642 (D.C. Cir. 1976) (emphasis added). *See also, Virgin Islands Telephone Company v FCC*, 198 F.3d 921, 924 (D.C. Cir. 1999):

In the *Computer III* regulatory scheme, the Commission offered the telephone companies for their provision of enhanced services the option of following non-structural safeguards – including unbundling the telecommunications component via Open Network Architecture – in lieu of requiring structural separation through fully separate subsidiaries.[55]

The Commission could use this regulatory model in the context of BIAS to offer Internet service providers with an analogous option – they could agree to follow whatever light-touch Open Internet regulations the Commission finds necessary in their provision of BIAS, instead of being required to unbundle the telecommunications component of their Internet access service.[56] And if a particular ISP decided it wanted to offer an Internet access service without following the Commission-prescribed light-touch Open Internet requirements, then customers of that ISP

> The Commission has subsequently interpreted this two-part test to mean that a carrier has to be regulated as a common carrier if it will "make capacity available to the public indifferently" or if "the public interest requires common carrier operation of the proposed facility." *Cable & Wireless, PLC,* 12 F.C.C.R. 8516 ¶¶ 14-15 (1997).

[55] *In re Amendment of Sections 64.702 of the Commission's Rules and Regulations* (Third Computer Inquiry) (Docket No. 85-229), 104 F.C.C.2d 958 (1986) (*Phase I Order*), *on reconsideration,* 2 FCC Rcd 3035 (1987) (Phase I Reconsideration); 2 FCC Rcd 3072 (1987) (Phase II Order). The FCC on February 18, 1988, released an order on further reconsideration of the *Phase I Order, Memorandum Opinion and Order on Further Reconsideration, In re Amendment of Sections 64.702 of the Commission's Rules and Regulations* (Third Computer Inquiry), 3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration); and an order on reconsideration of *Phase II Order, Memorandum Opinion and Order on Reconsideration, In re Amendment to Sections 64.702 of the Commission's Rules and Regulations* (Third Computer Inquiry), 3 FCC Rcd 1150 (1988) (Phase II Reconsideration).

[56] If the Commission chose to use this model, presumably it would need to issue a Further Notice of Proposed Rulemaking to address implementation issues, such as the type of regulation that would apply to the unbundled telecommunications component (*e.g.*, tariffs versus contracts), and the extent to which the Commission would forbear from the other Title II statutory provisions and regulations that would otherwise be applicable to the unbundled telecommunications component.

would have the option of accessing other Internet service providers through the compelled unbundled telecommunications component.

Unbundling of the telecommunications component should be practical. Indeed, many Incumbent local exchange carriers utilized such a business model of separately selling the telecommunications component through their provision of DSL service (and some still do). And assuming customers desired Internet access service on an Open Internet basis, then presumably there would be ISPs willing to offer such services, and customers could reach them via the unbundled telecommunications component, even if their ISP chooses not to offer BIAS compliant with the new Open Internet rules. Such a regulatory model would be legally sustainable, would avoid the problems caused by mis-classification of BIAS as a "telecommunications service," and would eliminate reliance on the flawed Section 706 authority.

B. Light-Touch Open Internet Regulations

Separate from the Commission's authority to adopt Open Internet rules are the issues of whether any such rules are necessary, and what form they should take if they are necessary. ADTRAN has long questioned the need for "net neutrality" regulations. Indeed, as ADTRAN explained back in 2010:

> ADTRAN shares the Commission's goal of a robust, widely-deployed Internet that continues to provide entrepreneurial, social and democratic opportunities to all Americans. The current "light touch" regulatory environment – including the Four Internet Principles -- has served this purpose well. Despite the enormous record compiled to date, only two instances of alleged abuse have been documented, and the Commission (along with industry self-policing) quickly resolved those problems with the tools at hand. Speculation about potential future abuse is not an adequate basis for imposing extensive new rules.
>
> Moreover, adoption of the proposed regulations will stifle investment as a result of possible misguided application of ambiguous rules and/or uncertainty over what practices will be permitted. While theoretically an Internet service provider could wait several years for a body of case law to develop that would flesh out the vague regulations proposed in the *Open Internet NPRM*, Internet service providers need to act quickly to

> respond to ever evolving risks like viruses and denial of service attacks (not to mention network congestion that varies from moment-to-moment). Recent experiences with implementation of the 1996 Act and the auction of spectrum in the 700 MHz band are a stark reminder of the cost of bad or vague regulations. In light of the absence of a demonstrated need for regulations, combined with the substantial risks imposed by those regulations, ADTRAN urges the Commission not to adopt the proposed rules. ADTRAN does, however, support adoption of greater disclosure obligations.[57]

Seven-and-a-half years later, Open Internet regulations still seem to be a solution in search of a problem. The *2015 Open Internet Order* justified the need for rules not on the basis of widespread (or indeed any) harmful behavior, but rather on speculation about what kinds of bad things ISPs might do.

As ADTRAN also explained in 2010, such speculation was unfounded, because ISPs are unlikely to engage in anticompetitive conduct:

> Moreover, to the extent the Commission is concerned that Internet access service providers may have the ability to discriminate against application providers that compete with services offered by the Internet access service provider, any such discriminatory conduct (such as degradation of a competitor's content) would need to be sufficiently significant to be effective, but thus would be readily discoverable. After all, if customers did not notice any difference in service, then the Internet access service provider presumably would gain no competitive advantage from such a tactic. And if such discriminatory treatment is readily apparent to consumers (and thus competitors), then it can be policed through government or private lawsuits.[58]

Those observations are equally true today – there has not been anticompetitive misconduct, nor is it likely to occur. However, the *2015 Open Internet Order* compounded the negative effects of the 2010 Open Internet rules by adopting the exceptionally vague General Conduct Rule, mis-classifying BIAS as a "telecommunications service" subject to Title II, and asserting Title II regulatory authority over Internet interconnection services.

As discussed above, the Commission can and should classify BIAS as an "information

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[57] ADTRAN Comments in GN Docket No. 09-191, filed January 14, 2010 at p. i.

[58] ADTRAN Comments in GN Docket No. 09-191, filed January 14, 2010 at p. 6.

service," which will reverse the most burdensome aspects of the *2015 Open Internet Order*. In addition, ADTRAN agrees with the *NPRM*'s proposal to eliminate the General Conduct standard,[59] which would eliminate the other most burdensome and unnecessary aspect of the *2015 Open Internet Order*. As the *NPRM* recognizes, the Zero Rating Report demonstrates that the General Conduct Rule is an exceedingly vague invitation for the Commission to disrupt the marketplace.[60] While it may have been tolerable to conduct years-long investigations of monopoly-era tariffs under the similarly vague "just and reasonable" standard,[61] ISPs cannot engage in the competitive, fast-paced Internet marketplace under such conditions. There simply is not time for a "common law" to develop interpreting the General Conduct Rule's standard of "not unreasonably interfere with or unreasonably disadvantage."[62] And the non-binding Bureau advisory opinions (that may or may not be issued at the Bureau's discretion) are not an adequate solution. Moreover, based on the history of an absence of abuses under the prior light-touch

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[59] *NPRM* at ¶¶ 72-75.

[60] *NPRM* at ¶ 74.

[61] Although an extreme example, the Commission investigated AT&T's WATS tariffs for over 25 years before finally concluding that market forces had overtaken the need to determine whether volume discounts for businesses were unjustly discriminatory. *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322 (D.C. Cir. 1980); *Revisions to Tariff F.C.C. No. 2 Wide Area Telecommunications Service (WATS) filed by American Telephone and Telegraph Co.*, 4 FCC Rcd 5389 (1989). But even well after competition was introduced into the long-distance market, AT&T's effort to introduce a volume discount for residential customers sparked an investigation and complaint proceeding that took some two years before the Commission concluded that AT&T's "block-of-time" tariff was lawful. *MCI Telecommunications Corporation v. American Telephone and Telegraph Company*, 60 Rad. Reg. 2d (P & F) 967, released July 2, 1986.

[62] *Cf*., NPRM Clyburn Dissent: "The proposal to eliminate the general conduct rule is precisely in line with an end-game of ensuring there is no referee on the field for broadband." A referee arbitrarily "throwing flags" to skew the ballgame hardly makes for a fair competition, however.

regulations and the 2015 Open Internet rules, there is simply no need for an open-ended prohibition on unspecified harmful conduct that might hypothetically arise. For all of these reasons, the Commission should repeal the General Conduct rule.

The *NPRM* also seeks comment on the continuing need for the "bright line" rules adopted in the *2015 Open Internet Order* – no blocking, no throttling and no paid prioritization. ADTRAN urges the Commission to rescind the rule banning paid prioritization. The *NPRM* raises a number of questions with regard to the benefits that could result from not prohibiting paid prioritization.[63] Judge Williams -- in his Opinion Concurring in Part and Dissenting in Part in the *USTelecom v. FCC* decision -- provides a thorough analysis of the significant legal and economic flaws underlying the *2015 Open Internet Order*'s adoption of the paid prioritization ban.[64] The ban prohibits conduct that is beneficial, and that has been approved by the Commission in numerous other contexts. A catchphrase of "there should be no tolls on the information superhighway" is not a substitute for a thorough analysis of the costs and benefits of such a ban, and economic literature makes clear that paid prioritization can produce tremendous benefits.[65] Moreover, the development of a substantial market for Content Delivery Networks

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63 *NPRM* at ¶¶ 85-87.

64 *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 760-66 (D.C. Cir 2016).

65 As Judge Williams explained:

> Generalizing the point made by Professor Hurwitz: Unless there is capacity for all packets to go at the same speed and for that speed to be optimal for the packets for which speed is most important, there must be either (1) prioritization or (2) identical speed for all traffic. If all go at the same speed, then service is below optimal for the packets for which speed is important. If there is unpaid prioritization, and it is made available to the senders of packets for which prioritization is important, then (1) those senders get a free ride on costs charged in part to other packet senders and (2) those senders have less incentive to improve their packets' technological capacity to use less transmission capacity. Allowance of paid prioritization eliminates those two defects of unpaid prioritization.

demonstrates that edge providers desire the capability to provide their customers with enhanced experiences, and are willing to pay for such functionality.[66] In sum, there are no good reasons to retain the flat ban on paid prioritization.

The *NPRM* additionally seeks comment on the "bright line" rules prohibiting blocking and throttling. To the extent the Commission is concerned about anticompetitive blocking or throttling, it is not clear that any particular rules are necessary, because the antitrust laws already allow the government to police such conduct. In addition, private parties – with the additional incentive of treble damages – can bring their own lawsuits to enforce the antitrust laws. And as explained above, any such conduct is unlikely to occur, because it must be sufficiently blatant to be of any benefit to the ISP, that that only increases the likelihood of getting caught. So it is not clear that the Commission needs to retain the "bright line" rules prohibiting blocking and throttling.

On the other hand, assuming the Commission includes reasonable network management exceptions to the blocking and throttling "bright line" rules, they are less objectionable than the ban on paid prioritization or the General Conduct rule, insofar as those latter rules prohibit beneficial conduct. However, if the Commission decides to retain the no blocking and no throttling rules, it should revise the present "reasonable network management" exception. The definition of "reasonable network management" in Section 8.2(f) currently specifies:

> *Reasonable network management.* A network management practice is a practice that has a primarily technical network management justification, ***but does not include other business practices***. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service. (emphasis added)

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[66] Indeed, the largest edge providers have constructed extensive networks that directly interconnect with ISPs' networks in order to ensure the equivalent of prioritized traffic.

The problem with this definition is that a "technical management justification" is also a "business practice," because maintaining an efficiently operating network is a business practice. Thus, the rule seems to say that all network management decisions could be excluded from the definition of "reasonable" network management decisions. This ambiguity casts a cloud over any network management practice, thus creating uncertainty over what conduct is prohibited. And uncertainty retards investment. ADTRAN thus suggests that the Commission revert to the prior definition of "reasonable network management" if the blocking and throttling rules are retained.[67]

The *NPRM* also seeks comment on the need to retain or modify the current transparency rule.[68] ADTRAN believes that disclosure benefits customers and the marketplace. Disclosure can allow the marketplace to function more effectively and more efficiently. On the other hand, as with any regulatory obligation, the Commission needs to also consider the burden imposed on the reporting entity – requiring the disclosure of too much information can confuse consumers, overwhelm the Commission and edge providers, impose costs on the ISPs that exceed any potential benefit, and risk disclosing sensitive information that could be misused by people seeking to exploit malware or viruses. It is thus critical that the Commission ensure that the disclosure obligations are designed correctly.

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[67] The previous definition specified:

> Reasonable network management. A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.

[68] *NPRM* at ¶¶ 89-91.

ADTRAN does not believe that the additional disclosure obligations mandated in the *2015 Open Internet Order* meet this test. As far as ADTRAN is aware, there was no demonstration that the disclosure rule adopted in 2010 was producing any widespread marketplace failures. The 2015 "enhancements" were burdensome and in many cases vague, without providing useful information to consumers. Absent a clear demonstration in any cost-benefit analyses that the benefits of the enhanced disclosure obligations exceed their costs,[69] ADTRAN urges the Commission to revert to the 2010 disclosure rule. The only addition ADTRAN would support would be the voluntary "safe harbor" disclosure label, which would provide a measure of consistency and certainty for consumers and ISPs.

C. Other Regulatory Issues

In addition to the regulatory changes discussed above, the *NPRM* raises several other issues with regard to broadband regulation. The *NPRM* proposes to continue the lifeline subsidy program for broadband even if it re-classifies BIAS as an information service.[70] The benefit of broadband is unquestionable insofar as it has become essential for participating in many activities, including education, health care and civic involvement. Re-classification of BIAS as an "information service" does not affect those beneficial properties, not does it affect eligibility for subsidization under the Commission's Lifeline program. Section 254 proclaims that one of the universal service principles is that "Access to advanced telecommunications and information services should be provided in all regions of the Nation."[71] Likewise, the definition of "universal

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69 *NPRM* at ¶¶ 105-115.

70 *NPRM* at ¶ 68.

71 47 U.S.C. § 254(b)(2).

service" makes clear that the supported services are not fixed as of 1996, but were expected to evolve over time.[72] ADTRAN thus believes that the Commission can and should continue to subsidize broadband services under the Lifeline program, notwithstanding "re-reclassification."

The *NPRM* also seeks comment on privacy regulation if the Commission reverts to the classification of BIAS as an "information service."[73] ADTRAN believes that with respect to privacy obligations, the various participants in the Internet marketplace should be subject to the same requirements. As ADTRAN explained in greater detail in its Reply Comments in response to Oppositions to the Petitions for Reconsideration of the Commission's privacy rules, differential treatment confuses customers and adversely affects competition in the marketplace for Internet advertising.[74] The *NPRM* proposes to defer to the Federal Trade Commission for enforcement of privacy issues with regard to BIAS. ADTRAN believes that could be a solution,

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[72] 47 U.S.C. § 254(c)(1):

> **(c) Definition**
> **(1) In general** *Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services*. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services—
> **(A)** are essential to education, public health, or public safety;
> **(B)** have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;
> **(C)** are being deployed in public telecommunications networks by telecommunications carriers; and
> **(D)** are consistent with the public interest, convenience, and necessity. (emphasis added)

[73] *NPRM* at ¶¶ 66-67.

[74] Reply Comments of ADTRAN in WC Docket No. 16-106, filed March 16, 2017.

but only if the issue regarding the "common carrier exemption" is resolved.[75]

Under the current Ninth Circuit Court of Appeals decision, however, the common carrier exemption is "status based," not "activities based," so that the FTC may not be able to regulate BIAS offered by service providers that also are common carriers.[76] That decision could be altered by the *en banc* review underway, or the "common carrier exemption" could be modified by Congress. If neither of those occur, however, then the Commission should resolve the problem by deciding to adopt the same privacy requirements as the FTC so that there would be uniform privacy obligations throughout the Internet ecosphere.

In addition, the *NPRM* seeks comment on whether re-classification of BIAS as an information service would affect the interplay between federal and state jurisdiction.[77] ADTRAN does not believe that the regulatory classification as an information service would affect regulatory jurisdiction. Like the VoIP services at issue in the *Vonage* decision, it would be impossible or impractical to separate the intrastate components of BIAS from its interstate components.[78] Thus, re-classification of BIAS as an information service will not affect the relative authority of federal and state regulators.

The *NPRM* also seeks comment on whether mobile broadband should be treated differently from fixed broadband.[79] ADTRAN believes the same light-touch regulatory rules

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[75] *See*, n. 34, *supra*.

[76] *FTC v. AT&T Mobility LLC*, 835 F.3d 993 (9th Cir. 2016), *reh'g en banc granted*, No. 15-16585, 2017 WL 1856836 (9th Cir. May 9, 2017).

[77] *NPRM* at ¶ 68.

[78] *Minnesota PUC v. FCC*, 483 F.3d 570, 578-81(8th Cir. 2007).

[79] *NPRM* at ¶ 95.

should apply to both "fixed" and "mobile" broadband. Given the real-time handoffs that occur on wireless devices as they switch between the service provider's wireless network (mobile) and Wi-Fi access points (fixed), applying different rules would be nearly impossible, and certainly confusing to consumers. In addition, in light of the competition that presently exists between wireline and wireless BIAS,[80] applying different rules would create an un-level playing field. And with 5G services on the horizon,[81] any such disparate treatment would have even more of an adverse effect on competition between "fixed" and "mobile" BIAS. On the other hand, ADTRAN recognizes that the architecture for wired and wireless broadband services are different, so that what constitutes "reasonable network management" for the different technologies could differ.

Finally, the *NPRM* seeks comment on whether any of the enforcement mechanisms adopted in the *2015 Open Internet Order* should be continued if the Commission re-classifies BIAS as an information service.[82] ADTRAN urges the Commission to eliminate the advisory opinion procedure, because it is non-binding, and thus of relatively little utility to ISPs, who would have no assurance that even after a "blessing" from the Bureau, they would not have to

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[80] Companies such as AT&T are presently providing "fixed" broadband access services using 4G LTE technology. http://risebroadband.com/2017/06/4g-lte-leveraged-fixed-wireless-broadband-rural-communities-rcr-wireless-news/.

[81] *E.g.*, *Press Release*, "Verizon to deliver 5G service to pilot customers in 11 markets across U.S. by Mid-2017." available at http://www.verizon.com/about/news/verizon-deliver-5g-service-pilot-customers-11-markets-across-us-mid-2017; *Fortune*, "Qualcomm readies itself for 5G with these 3 tech breakthroughs," available at http://fortune.com/2015/10/14/qualcomm-5g/ ("Qualcomm's executive vice president and chief technology officer Matt Grob says the company has been developing new technologies to commercialize for use in 5G wireless deployments. Grob says he expects to see these in use by 2020.").

[82] *NPRM* at ¶¶ 96-97.

cease providing the service later if the Commission decided that the offering violated the General Conduct standard or some other Open Internet rule. Moreover, the delay in waiting for an advisory opinion is intolerable in the rapidly changing Internet marketplace. In addition, presumably the Commission will repeal the General Conduct standard, thus eliminating a great part of the uncertainty that necessitated the advisory opinion process in the first place. For all these reasons, ADTRAN urges the Commission to eliminate the advisory opinion procedure.

Likewise, ADTRAN agrees with the *NPRM* that there is no need for a separate Ombudsperson, since that role can readily be fulfilled by the Commission's Consumer and Governmental Affairs Bureau.[83] Finally, ADTRAN believes that there is no need for any special formal complaint procedures applicable just to Open Internet issues. To the extent the Commission follow's ADTRAN's advice to utilize the *Computer III* model and ISP's voluntarily unbundle the telecommunications component of BIAS, any complaints with regard to such services can be resolved under the current Part 1 procedures.[84]

III. **Conclusion**

ADTRAN applauds the Commission's efforts to rein in the excessive and unnecessary regulation of broadband Internet access service. Neither the facts nor the statutory definitions justify the *2015 Open Internet Order*'s classification of BIAS as a "telecommunications service." The *NPRM*'s proposed re-classification of BIAS as an "information service" will eliminate much

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[83] *NPRM* at ¶ 97.

[84] 47 C.F.R. §§ 1.711-1.735. The Further Notice of Proposed Rulemaking that such a model would necessitate (*see* n. 56, *supra*) could also address whether there was a need for the Commission to adopt complaint procedures to address alleged violation by ISPs who chose to comply voluntarily with light-touch regulations in lieu of unbundling the telecommunications component.

of the unnecessary baggage of Title II regulation. ADTRAN has also provided herein its suggestions for imposing any necessary light-touch regulation, consistent with the Congressional directive "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." ADTRAN believes that such a course of action will best serve the public interest.

Respectfully submitted,
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